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CHARLES ELMORE CR
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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 387.

RUTH J. HENKEL, as Administratrix and Personal Representative of the Estate of CARL E. P. HENKEL, deceased,

Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Appellee.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEE'S BRIEF.

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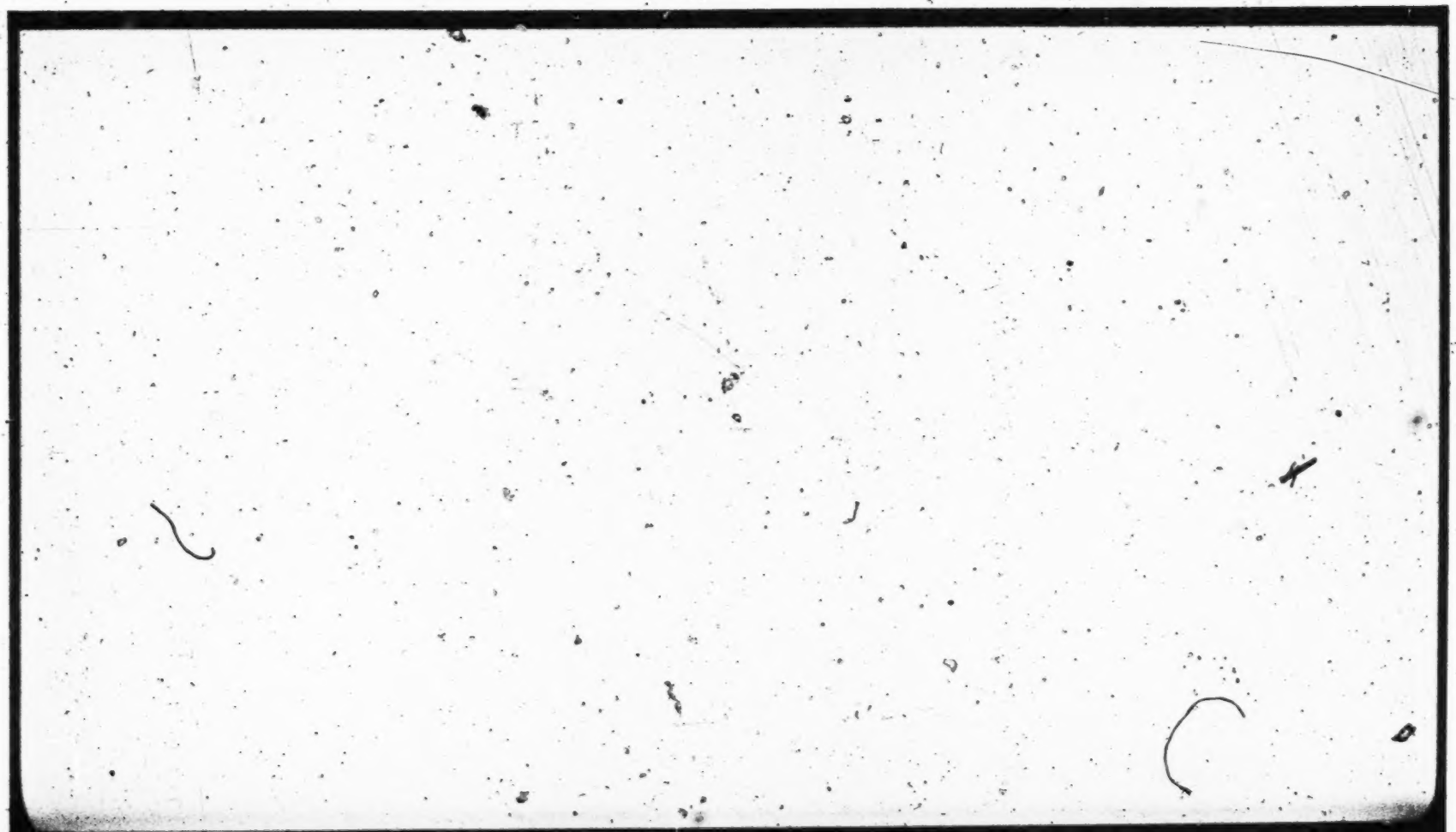

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On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

The sole question involved here is whether or not a Federal District Court has the power to allow expert witness fees (aside from the statutory fees for any witness) to be taxed as costs in a law case. The facts which give rise to this question have been clearly, succinctly and impartially stated by the court below and are printed in the certificate at Pages 1 to 3

thereof. In the interests of brevity we, therefore, refrain from repeating them here.

ARGUMENT.

THE FEDERAL STATUTES ON TAXATION OF WITNESS FEES OCCUPY THE ENTIRE FIELD TO THE EXCLUSION OF STATE STATUTES AND PRACTICES, AND SINCE THEY MAKE NO PROVISION FOR EXPERT WITNESS FEES, ASIDE FROM THE STATUTORY FEES FOR ANY WITNESS, SUCH EXPERT FEES ARE NOT TAXABLE.

The Act of Congress of April 26, 1926, Chapter 183, 44 Stat. 323, which appears in the various supplements to the United States Code under Title 28, Judicial Code and Judiciary, Sections 600a, 600b, 600c and 600d under the subhead "Fees of Jurors and Witnesses", so far as may be material here provides as follows:

> "600a. Per diem; mileage.—That * * * witnesses * * * in the United States Courts * * * who attend * * * shall be entitled to a per diem for each day of actual attendance and for each day necessarily occupied in traveling to attend court * * * and return home, and in addition, mileage as hereinafter provided." (* * * Denote omission of matter not material here).
>
> "600c. Amount of per diem and mileage for witnesses; subsistence.—Witnesses attending in such courts * * * shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same $2.00 and 5¢ per mile for going from his or her place of residence to the place of trial or hearing and 5¢ per mile for returning; and provided further, that witnesses * * * in the United States Courts * * * who attend court * * * at points so far removed from their respective residences as to prohibit return thereto from day to day, shall, when this fact is certified to in the

order of the court * * * be entitled in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3.00 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home."

Section 983 of the Revised Statutes which is in the United States Code, Title 28, Section 830, is the authority for taxation of costs and provides as follows:

"Same; bill of; taxation.—The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party; shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause".

Since these statutes provide just what witness fees shall be and when and how they shall be taxed, and make no exception as to expert witnesses, it follows, on familiar principles, that state statutes have nothing to do with the subject.

There are four reported cases in the Federal Courts directly in point and all four hold that fees for experts are not taxable beyond the statutory amount for any witness. These four cases are the following:

The William Branfoot, 52 Fed. 390 (C. C. A. Fourth Circuit);

In re Carolina Cooperage Co., 96 Fed. 604 at 605 (District Court Eastern District of North Carolina);

Bone v. Walsh Construction Co., 285 Fed. 901 (District Court Southern District of Iowa);

Cheatham Electric Switching Device Co. v. Transit Development Co., 261 Fed. 792 (C. C. A. Second Circuit).

In The William Branfoot, 52 Fed. 390, the Circuit Court of Appeals of the Fourth Circuit had this question before it, and under predecessor statutes of those now on the books, not differing therefrom in their material aspects, affirmed a holding of the District Court for the District of South Carolina, that "the compensation of experts called by the party in his own behalf cannot be taxed against the losing party as costs or as extra allowances and disbursements under the statute." The Circuit Court of Appeals said:

> "We think the court was right, and that as these charges, including expenses and disbursements, were not incurred under any action of the court, but by the party in the preparation and presentation of his own side of the case, the items were properly disallowed."

This case has been cited as authority on this proposition in other cases, and its doctrine has not been departed from for over thirty-nine years.

In re Carolina Cooperage Co., 96 Fed. 604, the United States District Court for the Eastern District of North Carolina, on the authority of The William Branfoot, held as follows:

> "The reduction of the allowance for witnesses before the commissioner from $10 to $3, as charged in the bill of costs, is approved as far as it goes, but it does not go far enough to comply with the law. The witness fees are allowed in the bill of costs as 'expert witnesses'. Extra allowance to expert witnesses cannot be allowed or taxed against a losing party in a United States district court sitting in admiralty or bankruptcy, but must be paid, according to the statute, $1.50 per day for actual attendance, and mileage. Rev. St. § 848; The William Branfoot, 3 C. C. A. 155, 52 Fed. 390, and 8 U. S. App. 129. Any extra allowance to 'experts' is a matter of personal or private contract between the parties,—the one summoning the ex-

pert and the witness so summoned and used. The witness fees will therefore be reduced to the amount allowed by statute,—$1.50 per day for actual attendance,—and no more. And for this amount witnesses must prove their attendance, as provided by statute, before any fee can be taxed in a bill of costs."

In Bone v. Walsh Construction Co., 235 Fed. 901, Judge Wade of the United States District Court for the Southern District of Iowa, having this precise question before him, reviewed the authorities rather extensively on the general subject of costs in the United States Courts. He stated the question thus:

"The main question in this case relates to the money expended in employing expert witnesses. The amount thus expended is $780.15. No question is made by plaintiff that this amount is unreasonable or unnecessary; so that we are confronted with the question as to whether or not, in the absence of a statute, the expense for experts in the preparation of a case, and in attendance for the trial, aside from statutory witness fees, can be allowed as costs, either upon dismissal, or upon final decree."

After citing and quoting from The William Branfoot, supra, and In re Carolina Cooperage Company, supra, as we have done above, the learned court said that these quotations reflect the general law of the country upon the question, citing a number of cases to this proposition, with one lone Minnesota state court case to the contrary. The learned court went on to say:

"From one point of view, this rule seems to work an injustice, and no doubt it does in many cases. The view of the courts seems to be that such matters should stand upon the same footing as counsel fees, as to which Justice Swayne, in Oelrichs v. Spain, 15 Wall. 231, 21 L. Ed. 43, observes:

'In equity cases, when there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality. * * * When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. * * * We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.'

"The rule contended for would involve great uncertainty as to the amount for which the losing party would be liable. * * *

"In some of the states, as in Iowa, laws have been passed permitting the courts to allow experts additional per diem while in attendance upon the court; but Congress has made no such enactment, and no Legislature, so far as I have been able to find, has passed a law permitting the taxation as costs of the compensation of the expert for time expended in preparing to testify.

"Under the foregoing, I am required to overrule the application of the defendant for allowance of the amount paid to experts, except the sum of $1.25 per day and mileage."

It will be noted that in the case just cited, the state of the district in which the action was brought had a statute permitting allowance to experts of additional per diem while in attendance, but in view of the absence of any such congressional authority in the Federal Statutes prescribing witness fees, the court did not feel justified in applying the state statute.

In Cheatham Electric Switching Device Co. v. Transit Development Co., 261 Fed. 792, the Circuit Court of Appeals for

the Second Circuit had this question under consideration. The facts and its holding are thus stated in the opinion (Page 796):

> "The question of costs first above referred to is this: Defendants have twice paid an expert witness a considerable fee, in order that he might testify in the long series of litigations between these parties. It is urged that defendants should be permitted to tax the expert's fee on his second appearance as a disbursement. *Allowance* of costs, etc., in equity is discretionary but *definition* of costs and taxable disbursements is a matter settled by statute or ruling authority, and we hold that expert's fees as witnesses are not legally taxable as costs or disbursements. Ordinary witness fees are taxable under the statute to be sure, but on the theory that the law requires the witness to attend and speak. An expert sells his opinion, as counsel sells his services, and he cannot by law be compelled to testify at all, while an attorney may be compelled to serve. There is considerably less reason for taxing experts' fees than might be urged for taxing the expense of legal counsel." (Italics ours).

The unanimity of the cases on the subject would seem to settle this matter. Appellant insists, however, that Section 725 of Title 28 of the United States Code, which is Section 721 of the Revised Statutes, taken from the Act of September 24, 1789, Chapter 20, Section 34, 1 Stat. 92, requires or permits the use of the Minnesota state statutes on expert witness fees, notwithstanding that Congress has passed a statute prescribing witness fees generally, and making no exception as to experts. Section 725 of Title 28 of the United States Code (R. S. 721) provides as follows:

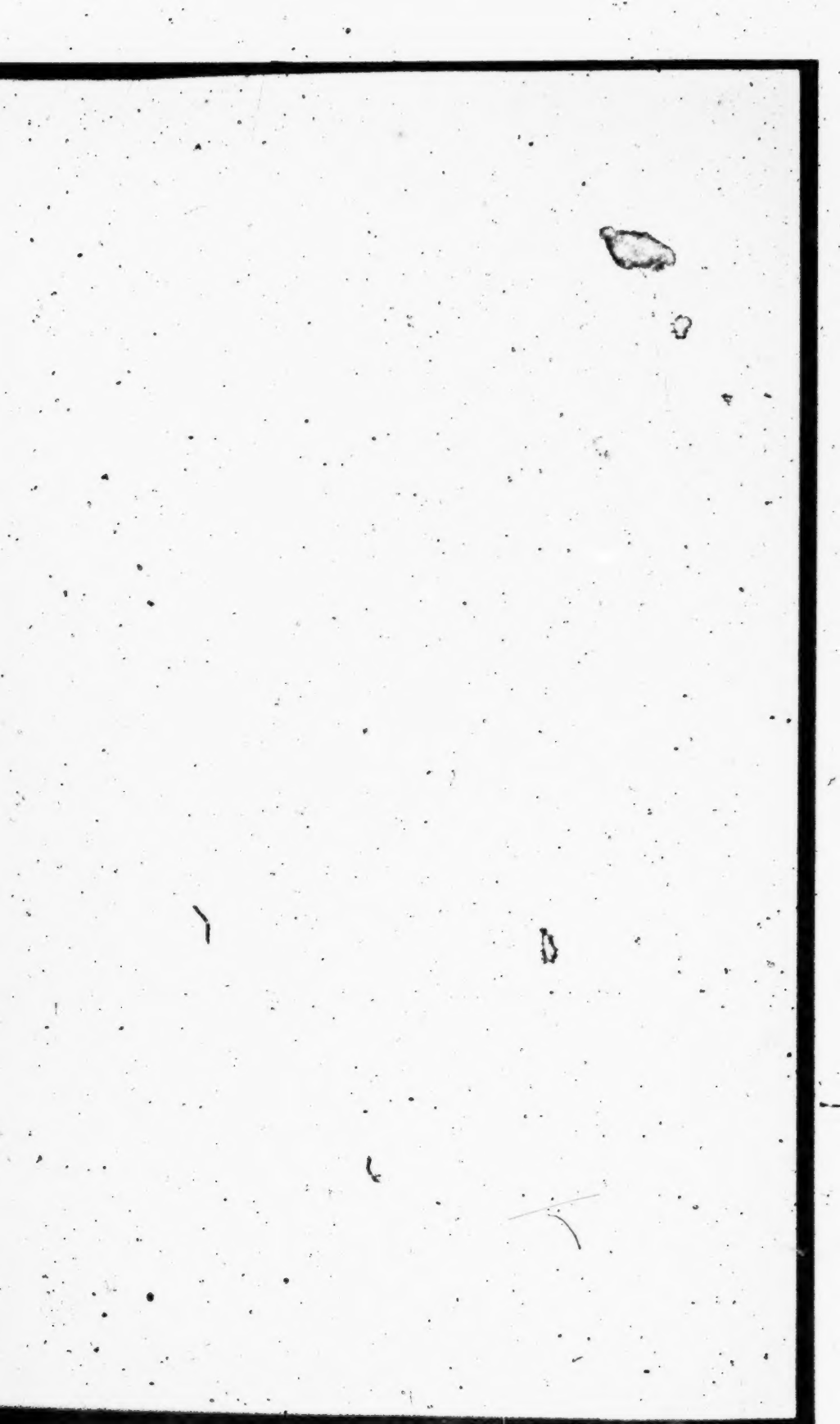
> "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in

trials of common law in the courts of the United States in cases where they apply."

This statute is inapplicable by its terms to the situation here under discussion because of the enactment by Congress of statutes specifying what the witness fees shall be. It is one of the best known and most cited provisions in the United States Statutes. It has been in effect since long before the four decisions relied upon here were handed down. It is hardly conceivable that it could have been overlooked in the Bone case, supra, where there was an Iowa statute authorizing expert witness fees, just as there is a Minnesota statute here.

No reported Federal cases holding that expert witness fees are taxable have been found, and counsel for appellant have not cited any. We believe that there are none. Unless, therefore, this court is prepared to overturn what has been the unanimous rule of the Federal courts for nearly forty years, the certified question must be answered in the negative, and the conclusion which the learned trial court reached on the authority of the decided cases, thereby sustained.

The cases upon which appellant relies are not in point. Ethridge v. Jackson, 2 Sawyer's U. S. Court Reports, Ninth Circuit, 598; 8 Federal Cases 801, Number 4541, is an old case, dealing not with the question of what fees shall be taxed but whether the prevailing party recovering so small a verdict that the state law would allow costs to the defendant, may recover his costs notwithstanding such law. The court reached the conclusion that the state law would operate to prohibit plaintiff's costs, but would not operate to give costs to the defendant, because Section 3 of the Act of February 26, 1853 (now Section 830 of Title 28 of the U. S. Code; R. S. 983) awarded costs only to the prevailing party, and to that extent precluded



trials of common law in the courts of the United States in cases where they apply."

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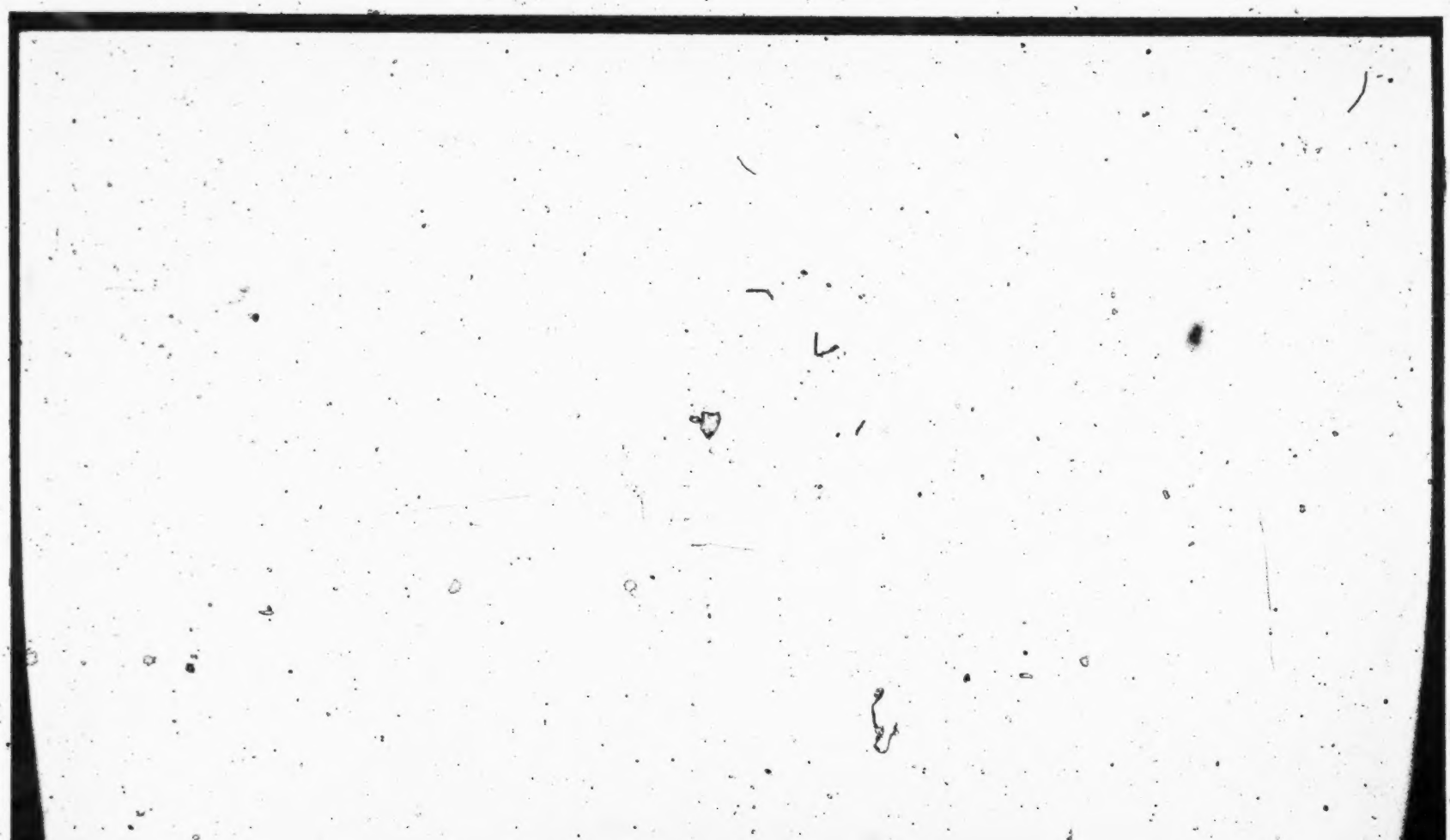
Since the foregoing was written, the case of *Ætna Life Insurance Company* v. *Allen*, 32 Fed. (2d) 490, has been found. This case holds contrary to the four cases upon which we rely, but does not mention any of them. In so far as it may be said to rest on the Conformity Act, it was distinguished in *The Wahkeena*, 51 Fed. (2d) 106, an admiralty case.

whether the prevailing party recovering so small a verdict that the state law would allow costs to the defendant, may recover his costs notwithstanding such law. The court reached the conclusion that the state law would operate to prohibit plaintiff's costs, but would not operate to give costs to the defendant, because Section 3 of the Act of February 26, 1853 (now Section 830 of Title 28 of the U. S. Code; R. S. 983) awarded costs only to the prevailing party, and to that extent precluded



the operation of the state law. This court is not called upon here to determine the correctness or otherwise of that part of this decision which gives effect to a portion of the state law, although its correctness may well be doubted in the light of later cases. Compare United States v. Treadwell, 15 Fed. 532; Pentlarge v. Kirby, 20 Fed. 898; Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 347; Merritt v. Merritt, 20 Fed. (2d) 541; Ex parte Peterson as Receiver of the Interstate Coal Co., 253 U. S. 300, 40 S. Ct. 543, 64 L. E. 919. The court in the Ethridge case distinguished between the *right to costs* and the question *what items are taxable as costs*, and called specific attention to the fact that a Federal Statute defines the items of expense that are taxable. The court said:

> "The Act of February 26, 1853 (10 Stat. 168) provides what attorney's fees and items of expense are taxable as costs in the national courts",

citing, among other cases, Dedekam v. Voge, 7 Federal Cases 339, Number 3731. In the Dedekam case the court had said:

> "This court has uniformly held that every item of costs taxable against a party to a suit is specified in the fee bill enacted February 26th, 1853 (10 Stat. 161), and that it cannot go out of the provisions and restrictions of that act, and make an allowance of costs on any considerations of equity or justice. The province of the taxing officer is accordingly now limited to the service of comparing a proposed charge with the particulars set forth by congress in that statute as taxable; and, when the charge is not found to fall within the enumerated and designated fees, it must be rejected."

Scatcherd v. Love, 166 Fed. 53, also relied upon by appellant, is likewise a case on the question, what party is entitled to costs, rather than what costs are taxable, and for the reason

just given as to Ethridge v. Jackson, supra, this court is not called upon at this time to determine its correctness or otherwise, although the authorities given for comparison with Ethridge v. Jackson show that its correctness may well be doubted.

Ex parte Peterson as Receiver of the Interstate Coal Co., 253 U. S. 300, 40 S. Ct. 543, 64 L. E. 919, is likewise not in point. That was a case involving an expenditure *ordered by the court* with a view to securing an intelligent consideration of the case. It involved auditor's fees, which, unlike witness' fees, were not dealt with by any act of Congress, either expressly or by implication. This court, in rendering its decision to the effect that the fees were taxable, carefully distinguished cases where, as at bar, the expenditure is made for the benefit of the party, as distinguished from expenditures incurred under order of the court to make possible, or to facilitate its consideration of the case.

People of Sioux County, Nebraska v. National Surety Co., 276 U. S. 238, 48 S. Ct. 239, 72 L. E. 547 and Business Men's Assurance Co. of America v. Campbell, 18 Fed. (2d) 223, remain to be considered. These cases involve the allowance of attorney's fees in actions prosecuted successfully against insurance companies or bonding companies by the beneficiaries of their policies or the obligees of their surety bonds. The Sioux County case, decided by this court, is later than the Business Men's Assurance Company case decided by the Circuit Court of Appeals, Eighth Circuit, and cites it, and since the two cases are to the same effect they may be considered together. The allowance of an attorney's fee, set by the court, was upheld in these two cases. In order to reach that conclusion, and not do violence

to the rule that where Congress has legislated as to costs, none except those named in the Act could be imposed, a line of reasoning was adopted which recognized the attorney's fee as being a part of the contractual liability of the insurance companies and bonding companies, which they had accepted by insuring risks in the state after the enactment of the statute authorizing the attorney's fees. This court in the Sioux County case held that the provision of the state statute to the effect that the attorney's fee should be allowed "as costs" did not make it costs as the term is used in the Federal Courts and, therefore, held that its allowance was not within the field of costs legislation covered by the Acts of Congress. That things which are within that field, such as witness fees, were not meant by this decision to be made determinable by state law is clear from the following quotations from the opinion:

> "In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that section 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R. S. §§ 823 and 824 (28 U. S. C. A. §§ 571, 572), the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See United States v. Sanborn, 135 U. S. 271, 282, 10 S. Ct. 812, 34 L. Ed. 112; The Baltimore, 8 Wall. 377, 388, et seq., 19 L. Ed. 463. Compare Ex parte Peterson, 253 U. S. 300, 314-319, 40 S. Ct. 543, 64 L. Ed. 919. * * *
>
> "That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added does not make it costs in the ordinary sense of the traditional, arbitrary and small fees of court officers, attorneys' docket fees and the like, allowed to counsel by R. S. §§ 823, 824. The present allowance, since it is not costs in the ordinary sense, is not within the field of costs legislation, covered by R. S. §§ 823, 824. That the particular

mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—*is not available to the federal courts* under R. S. §§ 823, 824, does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment." (Italics ours).

That part of the syllabus of this case as it is reported in 48 S. Ct. 239, dealing with this question, accurately sums it up in the following language:

"In an action against surety on bond of depository of county moneys, surety held liable for attorney's fees, to be included in judgment * * * under provision for allowance of such fees as costs in Comp. St. Neb. * * * *notwithstanding that costs in Federal Court are regulated exclusively by Rev. Stat. U. S.*, Sections 823, 824, since such allowance is not 'costs' in the ordinary sense." (Italics ours).

It is submitted that these two insurance cases dealing with attorney's fees are not determinative of a situation where witness fees are involved.

As long ago as 1890 this court recognized that the whole subject of fees in the courts of the United States is regulated by the federal statutes. In United States v. Sanborn, 135 U. S. 271 at 282 this court said:

"The whole subject of fees in the courts of the United States is regulated by chapter 16, title 'Judiciary' of the Revised Statutes. By section 823 it is provided that the fees allowed in that chapter and no other 'compensation' shall be taxed and allowed in the courts of the United States, to the officers therein named *and to witnesses*, except in cases otherwise expressly provided by law * * *". (Italics ours).

The "cases otherwise expressly provided by law", of course, refer to Federal law.

Trinidad Asphalt Paving Co. v. Robinson, 52 Fed. 347;
Merritt v. Merritt, 20 Fed. (2d) 541.

The general principle is well established that where Congress has legislated covering a particular field, there is no room for state regulation, and that the failure of Congress to legislate as to a particular matter in the field so covered nevertheless denies to the states the power to cover it by regulation of their own.

Northern Pacific Railway v. Washington, 222 U. S. 370, 32 S. Ct. 160, 56 L. E. 237;
Erie Railway v. New York, 233 U. S. 671, 34 S. Ct. 756, 58 L. E. 1149;
Napier v. Atlantic Coast Line, 272 U. S. 605, 47 S. Ct. 207.

As applied to the instant case, this doctrine means that where Congress has legislated respecting witness fees in United States courts and has made no exception as to expert witnesses, an intent is manifest to tax the fees of expert witnesses at the same rate as ordinary witnesses, and state legislation providing otherwise has no application in Federal Court.

Appellant's complaint that if she is denied the right to tax expert fees, she will be penalized for having brought her action in Federal Court, is not only immaterial, but is without merit. The witness fees and subsistence allowance for her ordinary witnesses, amounting to $5.00 per day for each witness under the Federal Statutes hereinbefore set forth, are five times what she would have been allowed in the Minnesota State Court. Section 7006 Mason's Minnesota Statutes, 1927, under the heading "Fees of Witnesses" provides as follows:

"1.- For attending in any action or proceeding in any court of record * * * $1.00 for each day".

So, when plaintiff, a resident of Nebraska (certificate Page 1), picked as her forum the United States District Court, District of Minnesota, rather than the State Court of Minnesota, it may be assumed that she expected to obtain certain advantages outweighing whatever disadvantages there might be.

CONCLUSION.

Since the Federal Statutes occupy the entire field of taxation of witness fees, and make no provision for the taxation of expert witness fees, aside from the statutory fees for any witness, such expert fees are not taxable. The certified question should, therefore, be answered "No".

Respectfully submitted,

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